



**THE ATTORNEY GENERAL  
OF TEXAS**

**AUSTIN, TEXAS 78711**

**CRAWFORD C. MARTIN  
ATTORNEY GENERAL**

April 8, 1971

Honorable A. C. Turner, Chairman  
Board of Pardons and Paroles  
John H. Reagan Building  
Austin, Texas 78701

Opinion No. M-833

Re: Does the condition attached  
to commutation "that subject  
never become eligible for  
clemency of any type at any  
future date" preclude parole?

Dear Mr. Turner:

You have recently requested an opinion of the following  
facts:

"On the 9th Day of January, A.D., 1953,  
Governor Allan Shivers commuted the sentence  
of Robert Ernest Miers, Execution #366,  
from a death sentence to life imprisonment  
in the Texas Department of Corrections 'con-  
ditioned that subject shall never become eli-  
gible for clemency of any type at any future  
date'.

"This Board is considering parole for this  
subject, but we feel we should obtain an of-  
ficial opinion of the Attorney General that  
will answer the following question:

"Does the condition attached to commuta-  
tion 'that subject shall never become eligible  
for clemency of any type at any future date'  
preclude parole under the provisions of Article  
781B, Code of Criminal Procedure."

Article 781b is now 42.12 of Vernon's Code of Criminal  
Procedure, under which executive clemency is now granted.

Since the year 1936, under the provisions of the Constitution of Texas, Article IV., Section 11, the power to grant commutation of sentence and pardons is vested in the Governor to be granted "on the written signed recommendation and advice of the Board of Pardons and Paroles, . . ."

The photostatic copy of the Governor's proclamation attached to your request for an opinion reflects that on January 9, 1953, the Board of Pardons and Paroles recommended that Robert Ernest Miers be granted the commutation of his death sentence to life imprisonment in the Texas penitentiary.

Commutation has been defined to mean "the change of the punishment assessed to a less severe one. It differs from a pardon in that it may be imposed without the consent of the convict or against his will." See Ex Parte Lefors, 303 S.W.2d 394 (Tex.Crim. 1957).

The commutation recommended by the Board of Pardons and Paroles was a form of clemency greater than the conditional commutation of sentence granted by the Governor. Commutation of the death sentence to life imprisonment alone would have made Miers eligible for parole after serving twenty (20) calendar years. Art. 42.12, Sec. 15, V.C.C.P. The commutation that was granted by Governor Allan Shivers was that Miers' death sentence would be commuted to life imprisonment conditioned that he never become eligible for clemency of any type at any future date. The Constitution of Texas, Article IV., Section 11, relating to the recommendations and advice of the Board of Pardons and Paroles to the Governor should not be confused with the right of the Governor to grant under the authority given him by the Constitution, commutations, paroles, pardons, or any other form of clemency that he deems advisable; for there is a marked legal distinction between the power of the Board to recommend or advise the Governor and the Governor's power to follow said recommendation. Art. 42.12, Sec. 33, V.C.C.P., provides as follows: "The provisions of this Act shall not be construed to prevent or limit the exercise by the Governor of powers of executive clemency vested in him by the Constitution of this State."

In Ex Parte Lefors, supra, the Court had before it a question arising in the construction of a proclamation wherein the Board of Pardons and Paroles had recommended to the Governor the commutation of a ten year sentence to time served. The Governor, however, by virtue of the authority vested in him under the

Constitution granted a conditional pardon conditioned upon several conditions set forth in the proclamation. Lefors was later arrested for having violated one of the conditions of his parole. On habeas corpus to the Court of Criminal Appeals, Lefors contended that he was entitled to discharge from custody because the Governor had not followed the recommendations of the Board of Pardons and Paroles. In upholding the Governor's power to grant a lesser clemency than recommended by the Board of Pardons and Paroles the Court stated on rehearing as follows:

"The majority are committed to the rule that the greater includes the lesser and the Governor may grant a lesser included form of clemency than recommended by the Board of Pardons and Paroles but may not constitutionally grant a greater form." 303 S.W.2d at page 400.

In Ex Parte Redwine, 236 S.W. 96 (Tex.Crim. 1921), the Court of Criminal Appeals stated as follows:

"We are of the opinion that, in the exercise of executive clemency to one convicted of a felony, the Governor may impose such conditions as he sees fit, and this may be done by direct expression or by reference and implication, and, as has often been said, it is only when the conditions are illegal, immoral, or impossible of performance that any question concerning them can be raised in the court."

In 67 C.J.S. at page 585, we find the following:

"Under statutes so providing, the power of prison authorities with respect to commutation of sentence is limited merely to recommending such action to the Governor; and the acceptance of such recommendation as to commutation and the amount thereof is a matter wholly within the discretion of the Governor."

At 67 C.J.S., page 588, we also find:

"In granting a conditional commutation, the authorized pardoning officer may impose such conditions, restrictions, and limitations as

he may think proper, provided they are not illegal, immoral, forbidden by law, or impossible of performance; and the condition may be either precedent or subsequent."

In applying the above rule, various conditions have been held proper. In the case of Ex Parte Davenport, 7 S.W.2d 589 (Tex.Crim. 1927), it appears that a person who was convicted of murder, and sentenced to imprisonment for a term of ninety-nine years, was pardoned by the Governor on the condition that he be confined in some state or private hospital for the insane, and in case he was not so confined the pardon could be revoked by the Governor. The pardon was later revoked by the Governor on the ground that the condition had not been complied with. The Court held that the Governor, in issuing the conditional pardon, reserved the right to revoke it on non-compliance with the conditions named, and was privileged to do so without judicial inquiry into the breach. This condition was not unreasonable.

In Ex Parte Collie, 240 P.2d 275, cert.den. 73 S.Ct. 1145, 345 U.S. 1000, 97 L.Ed. 1406 (1952), the Supreme Court of the State of California had before it an Application for Writ of Habeas Corpus wherein the Petitioner (Collie) attacked the validity of a condition imposed upon the commutation of his death sentence to life imprisonment that he should never be eligible for parole. The Supreme Court, speaking through Chief Justice Gibson, held that "a commutation is in the nature of a favor which may be withheld entirely or granted upon such reasonable conditions, restrictions and limitations as the Governor may think proper." He then went on to hold the condition was reasonable.

In Green v. Gordon, 246 P.2d 38, cert.den. 73 S.Ct. 187, 344 U.S. 886, 97 L.Ed. 1406 (1952), the Supreme Court of California once again had before it a mandamus action by a person convicted of first-degree murder whose sentence of death was commuted to life imprisonment without parole. The Court held that the commutation of sentence was in the nature of a favor which could withhold entirely or grant upon such reasonable conditions, restrictions and limitations as the Governor may think proper.

While it has been held that such a conditional commutation of sentence as is involved in this case is valid, the terms of the commutation by one governor cannot prohibit his successor

from changing or modifying its provisions. As was stated in Ex Parte Collie, supra, at page 276:

"The terms of the commutation purport to prevent a subsequent governor from granting petitioner permission to apply for parole, but it is clear that one governor has no power to prohibit his successors from changing a commutation of sentence or modifying its provisions. It is the general rule that one legislative body cannot limit or restrict its own power or that of subsequent Legislatures and that the act of one Legislature does not bind its successors. . . A similar rule should apply to the head of the executive branch of state government. Accordingly, the present commutation cannot be given effect as a restriction on the power of later governors to grant further executive clemency."

In answer to your question, the conditional commutation of sentence by Governor Allan Shivers cannot be given effect as a restriction on the power of a later governor to grant further executive clemency upon the written signed recommendation and advice of the Board of Pardons and Paroles. The doctrine of consistent interpretation of executive clemency requires that the present governor give great weight to the reasons that compelled a prior governor to act.

#### SUMMARY

The conditional commutation of sentence by one governor is not binding on a later governor's power to grant further executive clemency or parole upon the written recommendation and advice of the Board of Pardons and Paroles under Article 42.12, Vernon's Code of Criminal Procedure. However, the present governor, in considering the recommendation of the Board of Pardons and Paroles, may examine all circumstances relating to the prisoner's confinement and sentence commutation. The doctrine of consistent interpretation of executive clemency requires that the present governor give great weight to the reasons that compelled a prior governor to act.

Honorable A. C. Turner, Page 6 (M-833)

Yours very truly,

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